92-942

Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1992

KENNETH ROBERT AMES and
LILLIAN MAY AMES,
Petitioners

v.

SUNDANCE STATE BANK,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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December 4, 1992

QUESTIONS PRESENTED

1. Considering 11 U.S.C. §§502(c) and 553, must a Bankruptcy Court in a case commenced under Chapter 12 of Title 11 estimate a secured creditor's claim that is disputed by the debtor on the basis that the claim is subject to setoff as a result of the secured creditor's breach of contract and tortious conduct?

2. Considering 11 U.S.C. §§1225(a)(5)(B) and 1222(b)(7) and (8), may a reorganization plan filed in a case commenced under Chapter 12 of Title 11 provide for the transfer of a secured creditor's claim to different collateral that has a value not less than the allowed amount of that claim?

[**Note**: Petitioner reserves the right to argue Questions 3 and 4 in the event certiorari is granted on the above questions, but does not include Question 3 among the reasons for the grant of certiorari.]

3. Considering 11 U.S.C. §§502(b), 506(b), 1225(a)(5)(B)(ii), United Savings Association of Texas v. Timbers of Inwood Forest Assoc., Ltd., 484 U.S. 365 (1988) and Sexton v. Dryfus, 219 U.S. 339 (1911), should the allowed amount of a secured creditor's claim be determined on the date of the petition filed under Chapter 12 of Title 11, or on the date of the plan confirmation hearing?

4. Considering 11 U.S.C. §552, does a security interest covering all livestock of a debtor extend to livestock born after a bankruptcy petition is filed?

LIST OF PARTIES

The parties to the proceedings below are fully identified in the caption of the case.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

KENNETH ROBERT AMES and
LILLIAN MAY AMES,
Petitioners
v.
SUNDANCE STATE BANK,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners Kenneth Robert Ames and Lillian May Ames respectfully pray that writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled proceeding on August 21, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at In re Ames, 973 F.2d 849 (10th Cir. 1992) and is reprinted in the appendix hereto, p. 1a, infra.

The memorandum decisions of the United States District Court for the District of Wyoming have not been reported. They are

reprinted in the appendix hereto, p. 10a, infra.

The order of the United States Bankruptcy Court for the District of Wyoming has not been reported. It is reprinted in the appendix hereto, p. 18a, infra.

JURISDICTION

Jurisdiction for this matter is found under 28 U.S.C. §§158 and 1254(a). This matter originated as Bankruptcy Case No. 90-05053-D in the United States Bankruptcy Court for the District of Wyoming.

The judgment and opinion of the United States Court of Appeals for the Tenth Circuit was entered on August 21, 1992 affirming the decisions of the United States District Court for the District of Wyoming on appeals from the above-referenced Bankruptcy Court.

STATUTES INVOLVED

11 U.S.C. §101(5) Definitions.

In this title [11 USCS §§101 et seq.] --

(5) "claim" means

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C. §506(b) Determination of Secured Status.

To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c)

of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

11 U.S.C. §553(a)(3) Setoff.

Except as otherwise provided in this section and in sections 362 and 363 of this title [11 USCS §§362 and 363], this title [11 USCS §§101 et seq.] does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title [11 USCS §§101 et seq.] against a claim of such creditor against the debtor that arose before the commencement of the case, except to the extent that --

(3) the debt owed to the debtor by such creditor was incurred by such creditor --

(A) after 90 days before the date of the filing of the petition;

(B) while the debtor was insolvent; and

(C) for the purpose of obtaining a right of setoff against the debtor.

11 U.S.C. §1123(a)(5)(B)(D)(E) Contents of Plan

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall --

(5) provide adequate means for the plan's implementation, such as --

(B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;

(D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among

those having an interest in such property of the estate;

(E) satisfaction or modification of any lien.

11 U.S.C. §1129(b)(2)(A)(iii) Confirmation of Plan.

(b)(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A)(iii) for the realization by such holders of the indubitable equivalent of such claims.

11 U.S.C. §1222(b)(7) and (8) Contents of Plan.

Subject to subsections (a) and (c) of this section, the plan may

(7) provide for the payment of all or part of a claim against the debtor from property of the estate or property of the debtor;

(8) provide for the sale of all or any part of the property of the estate or the distribution of all or any part of the property of the estate among those having an interest in such property.

11 U.S.C. §1225(a)(5)(B) Confirmation of Plan.

Except as provided in subsection (b), the court shall confirm a plan if --

(5) with respect to each allowed secured claim provided for by the plan --

(B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and

(B)(ii) the value, as of the effective date of the plan, of property to be distributed by the trustee or the debtor under the plan on account of such claim is not less than the allowed amount of such claim.

28 U.S.C. §157(b)(2)(B) Procedures.

Core proceedings include but are not limited to --

> (B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12 or 13 of title 11 [11 USCS §§1101 et seq., 1201 et seq. or 1301 et seq.] but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11 [11 USCS §§101 et seq.].

STATEMENT OF THE CASE

The Petitioners, Kenneth R. Ames and Lillian M. Ames, filed their petition for relief under Chapter 12 of the Bankruptcy Code on February 23, 1990 in order to reorganize

the financial affairs of their farming and cattle ranching operation. The bankruptcy was precipitated by the sudden termination of their operating loan from Respondent which claimed a secured interest in petitioners' livestock, equipment and machinery. The other secured claims covered Petitioners' real estate.

The Petitioners filed their first Plan of Reorganization on February 26, 1990. No hearing was ever held on this Plan since it became evident after the first Meeting of Creditors that it would need to be amended. A corrected version of this Plan, which contemplated a suit or adversary proceeding against Respondent based on the breach of loan commitment, was filed on May 22, 1990. To prosecute this contemplated lender liability suit, Joseph E. Darrah, an attorney specializing in this kind of litigation, agreed to pursue the action on a contingency fee basis of

compensation. The estate was permitted to retain Mr. Darrah by Order entered by the Bankruptcy Court on August 1, 1990. Petitioners' lender liability claim was to act as an offset to the secured obligation of Sundance State Bank, thereby increasing the amount unavailable to unsecured creditors.

Despite the testimony of Attorney Darrah concerning the nature, theories and anticipated value of Petitioners' "lender liability" action, the Bankruptcy Court found that a Chapter 12 Plan that contemplated a recovery or offset from contingent claims was not feasible "because I don't believe that that suit has any value at all until there is a judgment in hand". That Court declined to estimate the claims pursuant to 11 U.S.C. §502(c) claiming it had no jurisdiction for such estimation and denied the confirmation of that Plan.

An amended Plan was filed, which provided, inter alia, that most of the cattle subject to Respondent's security interest would be liquidated. The Petitioners proposed to fund their Plan by increasing the amount of acreage devoted to hay and by leasing other portions of their land as cattle pasture. Because of the large equity in the cattle herd, the initial Plan payments would be funded out of the sales proceeds remaining after Respondent's lien was satisfied. The Respondent's (disputed) claim was originally proposed to be satisfied by substituting its interest in the livestock and other chattels by granting it a mortgage interest in the real estate second only to the interest of the first mortgagee. The first position mortgage would be reduced by the application of the cattle sale proceeds sufficient to allow Respondent a fully secured lien against real estate. Because the useful life of real

estate exceeds that of livestock (and is not nearly as vulnerable to harsh weather, disease and predators), this method allowed the Petitioner a much longer period to satisfy the lien. Only Respondent objected to this Plan.

To overcome this objection, the Petitioners proposed that the livestock sale proceeds be paid directly to Respondent, but it continued to object on the basis that its claim was actually larger that the Proof of Claim it had previously filed with the Court. Even though no proof of the additional amount claimed owing was provided to the Bankruptcy Court, this additional $20,000.00 that was now claimed by Respondent, because of interest and attorney's fees accumulation, was sufficient to prevent the Petitioners' Plan from providing enough cash flow to fund the Plan. Determining that Sundance State Bank was an oversecured creditor and that the value of that claim would be determined at the time of

confirmation, the Bankruptcy Court denied confirmation for lack of feasibility after opening argument of counsel. The Bankruptcy Court also held that because "the creditor is entitled to the benefits of his contract, which means in this case all of the property which is collateral for the loan of the bank, is subject to the payment of that loan before it can be used for anything else . . . it is wrong to substitute collateral." It also lifted the stay and then dismissed the case (again without any testimony or evidence).

The District Court for the District of Wyoming affirmed these orders. An appeal of the District Court's decision was taken to the United States Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. §158(d). Without any comment concerning the requirements of 11 U.S.C. §502(c), the Tenth Circuit affirmed the denial of the Petitioners' first Plan, because of "the speculative nature of

debtors' potential litigation against the Bank. . . " (See Appendix hereto at 8a-9a.)

Citing only 11 U.S.C. §1225(a)(5)(B) (and not 11 U.S.C. §1222(b)(7) and (8)), the Tenth Circuit has determined that a debtor cannot confirm a Plan that proposes to satisfy a claim by substituting collateral. That court went on to find no abuse of discretion in dismissing the Petitioners' Chapter 12 case.

In its decision, the Tenth Circuit ignored the primary reason that the Petitioners' last submitted plan was denied confirmation, namely feasibility. Because the Bankruptcy Court determined that a secured creditor's claim is to be valued on the date of the confirmation hearing, as opposed to the filing date of the bankruptcy petition, the Petitioners' plan was not capable of satisfying the cash flow requirements of their proposed plan.

REASONS FOR GRANTING THE WRIT

I.

The Tenth Circuit's denial of Petitioners' position that the Bankruptcy Court should have estimated Respondent's disputed claim in light of Petitioners' offsetting breach of contract claims (1) abrogates the intent of 11 U.S.C. §502(c) and (2) conflicts with decisions from other circuits.

In contrast to the reasoning underlying In re Corey, 892 F.2d 829 (9th Cir. 1989) and A. H. Robbins v. Piccinin, 788 F.2d 1994, 1011-12 (4th Cir. 1986), Matter of Brints Cotton Marketing, Inc., 737 F.2d 1338 (5th Cir. 1984), Bittner v. Borne Chemical Co., Inc., 691 F.2d 134 (3rd Cir. 1982), and In re Ben Cooper, Inc., 896 F.2d 1394 (2d Cir. 1990), the Tenth Circuit has declined to find that a bankruptcy court, for plan confirmation purposes, should estimate the amount of setoff a debtor may have against a creditor's claims. The opposing view is probably best represented by the Second Circuit:

> Section 502(c)(1) of the Code embodies Congress' determination that the bankruptcy courts are better equipped to evaluate the evidence supporting a particular claim within the context of a particular bankruptcy proceeding.

Bittner, supra, 691 F.2d at 136. Citing the general policy behind reorganizational bankruptcies that emphasize speed and simplicity as being advantageous to both creditors and debtors, the Third Circuit found that this policy is advanced by the Bankruptcy Court's duty to estimate the value of the stock in the debtor company in view of an anticipated breach of contract suit. Id 136-37. Similarly, the Supreme Court has acknowledged this purpose of bankruptcy law (whose purpose is probably best illustrated by Section 502(c)):

> [T]his Court has long recognized that a chief purpose of the bankruptcy law is "to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period . . ." and that provision for summary disposition, "without regard to usual modes of trial attended by some necessary delay," is one of the

> means chosen by Congress to effectuate that purpose . . . It is equally clear that the expressly granted power to "allow", "disallow" and "reconsider" claims which is of 'basic importance in the administration of a bankruptcy estate' is to be exercised in summary proceedings and not by slower and more expensive processes of plenary suit . . .

Katchen v. Landy, 382 U.S. 323, 328-329 (1966). See also In re Towner Petroleum Co., 48 B.R. 182 (Bankr. W.D. Okla. 1985); In re Curtis, 40 B.R. 795 (Bankr. D. Utah 1984).

Chapter 12 of the Bankruptcy Code has, as one of its purposes, the prompt administration and distribution of payments and assets to creditors as evidenced by the requirements under 11 U.S.C. §1221 of the Bankruptcy Rules that a Chapter 12 Plan be filed within 90 days of the petition filing. The Confirmation Hearing on that Plan "shall be concluded not later than 45 days after the filing of the Plan". 11 U.S.C. §1224. 11 U.S.C. §1208(c)(1) allows for Chapter 12 cases to be dismissed or converted in case of "unreasonable delay by

the debtor" and §1202(b)(4) requires the trustee to "ensure that the debtor commences making timely payments".

As part of the goal of prompt administration of bankruptcy estates, claims for setoffs under 11 U.S.C. §553 fall within the scope of 11 U.S.C. §502(c). In order to determine the validity and amount of Respondent's claim against the Petitioners' bankruptcy estate, the estate claim against Respondent must also be determined. The ability to exercise the power of setoff under 11 U.S.C. §553 is available to Debtors. In re Braniff Airways, Inc., 42 B.R. 443, 447 (Bankr. N.D. Tex. 1984); In re Snead, 1 B.R. 551 (Bankr. E.D. Va. 1979). Nor does the claim have to be liquidated, matured, or not contingent to allow the setoff. Braniff Airways, Inc., v. Exxon Co., 814 F.2d 1030 (5th Cir. 1987); In re Matthieson, 63 B.R. 56 (D. Minn. 1986).

The clear use of the word "shall" rather than "may" in Section 502(c) directs that the duty to estimate the contested claim is mandatory rather than permissive. In re Aquaslide 'N' Dive Corp., 85 B.R. 545, 549 (9th Cir. BAP 1987); In re Johns-Manville Corp., 45 B.R. 823 (S.D.N.Y. 1984); In re Continental Airlines Corp., 64 B.R. 882 (Bankr. S.D. Tex. 1986); In re Poole Funeral Chapel, Inc., 63 B.R. 527 (Bankr. N.D. Ala. 1986); In re Towner, supra; In re Curtis, supra; In re Zucker, 20 C.B.C. 1026 (Bankr. S.D.N.Y. 1979).

The negative impact of this Tenth Circuit decision is twofold: (1) Debtors proposing reorganization plans must provide for the full payment of a disputed claim with funds that otherwise would be available to unsecured creditors; or (2) all proceedings (and payments) in the bankruptcy case will be delayed so as to allow the usually lengthy process of plenary suit to determine the

litigation for plan confirmation purposes. The Tenth Circuit decision needlessly delays administration of reorganization cases to the detriment of both debtors and creditors.

II.

The Tenth Circuit's denial of Petitioners' Plan to satisfy a secured creditor's lien with other property (1) is contrary to 11 U.S.C. §1222(b) (7) and (8), and (2) conflicts with decisions from other circuits.

Asset payment plans, as opposed to payments with installments of cash, are clearly contemplated under 11 U.S.C. §1222(b)(7) and (8). Due to the similarities and purposes underlying both Chapter 13 and Chapter 12, courts considering Chapter 12 issues may look to their Chapter 13 counterpart. See e.g. Justice v. Valley Nat'l. Bank, 849 F.2d 1078, 1083 (8th Cir. 1988); In re Willingham, 83 B.R. 552, 553 (Bankr. S.D. Ill. 1988). The legislative history and commentary for the Chapter 13

sections analogous to §1222(b)(7) and (8) - §1322(b)(8) and (9) - support the propriety of the "substitution of collateral" method of payment:

> . . . the secured creditor in a case under Chapter 13 may receive <u>any property</u> of a value as of the effective date of the plan equal to the allowed amount of the creditor's secured claim rather than being restricted to receiving deferred cash payments. (emphasis added)

124 Cong. Rec. §11,107 (Daily Ed. Sept. 28, 1978).

A similar provision to 11 U.S.C.§1222(b)(7) is contained in 11 U.S.C. §§1129(b)(2)(A)(iii) and 1123(a)(5)(B) and (D). Although the standards for plan confirmation in a Chapter 11 are different from a Chapter 12 (e.g. "indubitable equivalent" standard), Congress obviously contemplated asset payment plans when it enacted the various Chapters of the Bankruptcy Code dealing with reorganization.

As reflected by the <u>Ames</u> decision, the Tenth Circuit has aligned itself with the

Eighth Circuit (In re Hanna, 912 F.2d 945 (1990) in conflict (in principle) with the Fifth Circuit's approval of asset payment plans such as substitution of collateral. See Matter of Sandy Ridge Development Corp., 881 F.2d 1346 (5th Cir. 1989); Simmons v. Savell, 765 F.2d 547, 554 f.8 (5th Cir. 1985); Matter of Sun Country Development, Inc., 765 F.2d 406 (5th Cir. 1985). The Tenth Circuit's position holds that the mandatory provision of 11 U.S.C. §1225(a)(5)(B) takes precedence over §1222(b)(7) and (8) rather than trying to reconcile and harmonize the statutes. Indeed §1222(b)(7) and (8) (and the similar provisions in Chapters 13 and 11 cited above) appear to be totally ignored in both Ames and Hanna, which is contrary to the overwhelming majority position as reflected not only by the Fifth Circuit cases but by such cases as In re San Felipe @ Voss, Ltd., 115 B.R. 526 (S.D. Tex. 1990); In re Cansler, 99 B.R. 758 (W.D.

Ky. 1989); Greseth v. Federal Land Bank, 78 B.R. 936 (D. Minn. 1987); Matter of T. M. Monroe Manor Associates, Ltd., 140 B.R. 298 (Bankr. N.D. Ga. 1991); In re Kerwin-White, 129 B.R. 375 (Bankr. D. Vt. 1991); In re Western Real Estate Fund, Inc., 109 B.R. 455 (Bankr. W.D. Okla. 1990); In re Neff, 89 B.R. 672 (Bankr. S.D. Ohio 1988); In re Chaney, 87 B.R. 131 (Bankr. D. Mont. 1988); Matter of Arthur, 86 B.R. 98 (Bankr. W.D. Mich. 1988); In re Ivy, 86 B.R. 623 (Bankr. W.D. Mo. 1988); In re O'Farrell, 74 B.R. 421 (Bankr. N.D. Fla. 1987); In re Mikkelsen Farms, Inc., 74 B.R. 280 (Bankr. D. Or. 1987); In re Fursman Ranch, 38 B.R. 907 (Bankr. W.D. Mo. 1984); In re Stockwell, 33 B.R. 303 (Bankr. D. Or. 1983).

The Tenth's Circuit's decision renders 11 U.S.C. §1222(b)(7) and (8) superfluous, and imposes an overly rigid and narrow impediment to the flexibility that was intended by the enactment of Chapters 12 and 13 of the

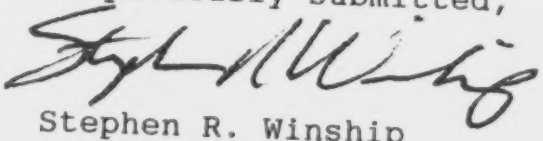
Bankruptcy Code. (See 11 U.S.C. §1222(b)(11) and S. Rept. No. 95-989, p. 141 (1989) and In re Massengill, 73 B.R. 1008, 1012 (Bankr. E.D. N.C. 1987).) In fact, the Eighth Circuit's decision relied upon by the Tenth Circuit acknowledges that the "literal application of 11 U.S.C. §1225(a)(5) (B)(i)" is at odds with the Congressional intent behind the enactment of Chapter 12 ". . . to give family farmers facing bankruptcy a fighting chance to reorganize their debts and keep their land". In re Hanna, supra, 912 F.2d at 950.

The rehabilitative goals of Chapter 12 that the Supreme Court has acknowledged are seriously hindered if the Tenth Circuit's decision is allowed to stand. See Northwest Bank Worthington v. Ahlers, 485 U.S. 197, 210-11 (1988). Plenary consideration of the matter by this Court is essential.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,



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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

IN RE: KENNETH ROBERT AMES, LILLIAN MAY AMES, Debtors.	)	
KENNETH ROBERT AMES, also known as Kenny Ames; and LILLIAN MAY AMES, Appellants, v. SUNDANCE STATE BANK, Appellee.	)	No. 91-8065

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING
(D.C. No. 91-CV-0029-K)

Submitted on the briefs:

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Ken McCartney of Law Offices of Ken McCartney, P.C., Cheyenne, Wyoming, for Appellee.

Before MOORE, BARRETT, and BRORBY, Circuit Judges

BARRETT, Senior Circuit Judge.

Debtors appeal the district court's decision affirming the bankruptcy court's determinations resulting in the dismissal of their Chapter 12 bankruptcy case.[1] Although debtors assert eleven issues on appeal, those issues are subsumed by four questions: did the bankruptcy court err in 1) denying confirmation of debtors' first amended plan for reorganization; 2) denying confirmation of the second amended plan; 3) granting Sundance State Bank (Bank) relief from the automatic stay; and 4) dismissing debtors' bankruptcy action. This court reviews the bankruptcy court's findings of fact under a clearly

[1] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

erroneous standard, while reviewing that court's legal determinations de novo. Citizens Nat'l Bank & Trust Co. v. Serelson (In re Burkart Farm & Livestock), 938 F.2d 1114, 1115 (10th Cir. 1991). Upon consideration of the parties' arguments and the record on appeal, we affirm.

Debtors are cattle ranchers in Wyoming. The Bank had financed debtors' cattle operation for a number of years. In 1989, however, the Bank informed debtors it would no longer provide financing. Debtors assert that this decision by the Bank forced them to seek bankruptcy relief.

The bankruptcy court determined that debtors' ranch had a value of $200,000. At the time they filed their Chapter 12 bankruptcy petition, debtors owed approximately $1,200 in real estate taxes to Crook County, Wyoming; $171,600 to the Wyoming Farm Loan Board, secured by a first mortgage on debtors'

ranch; $71,700 to the Small Business Administration, secured by a second mortgage on the ranch; $43,000 to the Farmers Home Administration, secured by a third mortgage on debtors' ranch; and $135,000 to the Bank, secured by a security interest in all of debtors' machinery, equipment, livestock, and feed, as well as the products and proceeds thereof. There were also several unsecured creditors holding claims totalling approximately $10,300.

Debtors first argue that the bankruptcy court erred in denying confirmation of their first amended plan for reorganization. That plan, in pertinent part, provided that no payments be made to the Bank. Rather, Debtors asserted that litigation they planned to pursue against the Bank for "breach of implied loan commitments and resulting personal injuries," Appellants' app., doc. 9 at 3, would produce an award of damages in excess of debtors' obligation owed to the Bank. Id.

The bankruptcy court declined to confirm this plan, determining that because the plan relied primarily upon debtors' pursuit of possible litigation against the Bank, the plan was not feasible. See 11 U.S.C. §1225(a)(6) (bankruptcy court shall confirm plan if, inter alia, debtor will be able to make all payments called for under plan and will be able to comply with plan's terms). In making this determination, the bankruptcy court expressly refused to value debtors' causes of action against the Bank for purposes of confirming the plan. Debtors argue that the bankruptcy court's failure to estimate the value of these potential claims was error.

Debtors bear the burden of establishing all elements necessary for confirmation of a plan, including the feasibility of the plan. In re Novak, 102 B.R. 22, 24 (Bankr. E.D.N.Y. 1989). Although debtors are not required to guarantee the success of the plan, they must

provide "reasonable assurance that the plan can be effectuated." In re Hopwood, 124 B.R. 82, 86 (E.D. Mo. 1991). A plan's "income projections must be based on concrete evidence and must not be speculative or conjectural." In re Novak, 102 B.R. at 24. Because of the speculative nature of debtors' potential litigation against the Bank, the bankruptcy court did not err in declining to confirm this plan. See In re Cherry, 84 B.R. 134, 138-39 (Bankr. N.D. Ill. 1988) (Chapter 11).

Debtors next argue that the bankruptcy court erred in denying confirmation of their second amended plan. That plan called for, among other things, the sale of the livestock securing the Bank's note and use of the proceeds of that sale to reduce debtors' obligation owed to the Wyoming Farm Loan Board, which held a first mortgage on debtors' ranch. The plan further provided that the Bank's note would be modified to make it payable over a

thirty-year period. Finally, the plan substituted a second mortgage interest in debtors' ranch for the Bank's secured interest in debtors' livestock, feed, and equipment.

11 U.S.C. §1225(a)(5) requires that, in cases like this, where the secured creditor objects to the terms of the plan and the debtor is not surrendering the property subject to the security interest to the creditor, the plan must satisfy two requirements: 1) the plan must provide that the creditor retain the lien securing the claim; and 2) the plan must provide that the secured creditor receive property having a present value not less than the allowed amount of the claim. 11 U.S.C §1225(a)(5)(B); see also Abbott Bank-Thedford v. Hanna (In re Hanna, 912 F.2d 945, 949 (8th Cir. 1990). The terms of debtors' second amended plan failed to satisfy §1225(a)(5)(B) because the plan substituted a second mortgage interest in real

property for the Bank's lien on debtors' livestock and equipment. In re Hanna, 912 F.2d at 951-52. The bankruptcy court, therefore, did not err in declining to confirm the second amended plan. See id. at 952. Because these determinations support the bankruptcy court's denial of confirmation of both plans, the court need not address debtors' remaining arguments in support of the confirmability of these plans.

Debtors next argue that the bankruptcy court erred in dismissing debtors' bankruptcy action. Because dismissal of a Chapter 12 case is appropriate when debtors have failed to propose a confirmable plan, see, e.g., Euerle Farms, Inc. v. State Bank (In re Euerle Farms, Inc.), 861 F.2d 1089, 1091-92 (8th Cir. 1988), the bankruptcy court did not abuse its discretion, see United States v. Lawless (In re Lawless), 79 B.R. 850, 853 (W.D. Mo. 1987), in dismissing debtors' case.

Lastly, debtors argue that the bankruptcy court erred in granting the Bank relief from the automatic stay. Although relief from the stay would be justified in these circumstances, see In re Novak, 103 B.R. 403, 412 (Bankr. E.D.N.Y. 1989) ("What constitutes 'cause' for dismissal, which would terminate the stay as to all creditors, surely constitutes 'cause' for relieving a single creditor of the automatic stay."), because the bankruptcy court properly dismissed debtors' bankruptcy action, that court's order granting the Bank relief from the automatic stay is moot, see, e.g., In re Coones Ranch, Inc., 138 B.R. 251, 260 (Bankr. D.S.D. 1991).

The judgment of the United States District Court for the District of Wyoming is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

IN RE:	)	
	)	
KENNETH ROBERT AMES and LILLIAN MAY AMES,	)	Case No. 90-05053-D Chapter 12
	)	
Debtors.	)	
	)	
KENNETH ROBERT AMES, a/k/a KENNY AMES, and LILLIAN MAY AMES,	)	
	)	
Appellants,	)	
	)	Civil Case No.: 91-CV-0029-K
vs.	)	
	)	
SUNDANCE STATE BANK,	)	
	)	
Appellee.	)	

ORDER DENYING MOTION FOR RECONSIDERATION

THIS MATTER having come for hearing in open Court on July 15, 1991, on the Debtors'/ Appellants' Motion to reconsider the Court's Order of May 30, 1991, affirming the Bankruptcy Court's Order, the Court heard argument of counsel, Stephen R. Winship, of Donald R. Winship & Associates, P.C., attorney for the Debtors, and Ken McCartney, of The Law Offices

of Ken McCartney, P.C., attorney for the Appellee, Sundance State Bank, and was thus advised.

THE COURT generally finds that:

1. Whether the Bankruptcy Court relied at all upon the Debtors' Second Amended Plan being filed late, the fact that it was the Debtors' Third Plan and was in fact legally deficient is certainly such that dismissing the case was within the sound discretion of the lower Court, and

2. Upon review de novo this Court remains in agreement with the Bankruptcy Court's conclusion that all three (3) of the Debtors' proposed Chapter 12 Plans were inadequate for various legal reasons and could not be confirmed.

WHEREFORE, IT IS ORDERED THAT the Applicant's Motion shall be and hereby is denied.

DONE this 30th day of August, 1991.

/s/ Ewing T. Kerr
EWING T. KERR
U. S. DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

IN RE:	)	
	)	
KENNETH ROBERT AMES,	)	Bankruptcy Case
a/k/a KENNY AMES,	)	No. 90-05053-D
SSAN: 520-44-6044	)	Chapter 12
LILLIAN MAY AMES,	)	
SSAN: 520-48-5313	)	
	)	
Debtors-Appellants,	)	
	)	
vs.	)	
	)	
SUNDANCE STATE BANK,	)	Civil Case
	)	No. 91-CV-0029-K
Appellee.	)	

ORDER AFFIRMING BANKRUPTCY COURT DECISION

THIS MATTER comes before the Court upon an appeal filed by the Debtors on November 13, 1990. The Ames' appeal Orders entered by the Bankruptcy Court on November 8, 1990, denying confirmation of the Third Amended Plan, and on November 8, 1990, granting Stay Relief to the Sundance State Bank.

Each party herein filed a Brief, Appellant also filed a reply Brief. A Hearing was held on May 22, 1991. Appearing for the Appellant was Stephen R. Winship, of Donald R.

Winship and Associates. Appearing for the Appellee was Ken McCartney, of The Law Offices of Ken McCartney, P.C. After reading the Briefs and hearing the arguments of counsel, and being otherwise fully advised in the matter, the Court hereby makes the following conclusions of law:

1. The Appellant raises nine (9) issues upon appeal, all of which are not necessarily decided by this Court in light of the Court's decision hereafter. It should be noted that issues numbered One (1), Two (2), and Three (3) were probably not placed squarely before the Bankruptcy Court in the first instance having arisen more from argument of counsel than from pleadings in controversy.

2. When reviewing decisions from the Bankruptcy Court, the District Court is guided by a clearly erroneous standard of factual review. First Bank of Colorado Springs v. Mullet (In re Mullet), 817 F.2d 677, 678 (10th

Cir. 1987). See also Fed.R.Civ.P. 52(a). Although this standard allows a reviewing Court to make legal determinations de novo, Travelers Insurance Co. v. American Ag Credit Corp. (In re Blehm Land & Cattle Co.), 859 F.2d 137, 138 (10th Cir. 1988), there is no requirement that the Court undertake a de novo review of the Bankruptcy Court's decision. Branding Iron Motel, Inc., v. Sandlian Equity, Inc. (In re Branding Iron Motel, Inc.), 798 F.2d 396, 399-400 (10th Cir. 1986). A reviewing Court must be wary not to reverse the decision of the Bankruptcy Court merely because it would have decided the case differently. Anderson v. City of Bessemer City, 470 U.S. 564, 573-574 (1985).

3. The objecting party has the burden to demonstrate clear error in factual findings at the trial level. See United States v. Denver & Rio Grande Western R.R. Co., 547 F.2d 1101, 1103 (10th Cir. 1977). Only if the

Court, after an examination of the entire record, is left with "'the definite and firm conviction that a mistake has been committed . . .'" will factual findings be disturbed as clearly erroneous. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 396 (1948), reh'g denied, 333 U.S. 869 (1948)). All the evidence, together with any reasonable inferences to be drawn therefrom, must be viewed in the light most favorable to the party prevailing below. See McNally Pittsburg, Inc., v. International Association of Bridge, Structural & Ornamental Iron Workers, 812 F.2d 615, 620 (10th Cir. 1987).

4. The Court finds that the Debtors failed timely to file their Third Amended Plan as required by a Bankruptcy Court's Order, and having filed a legally defective Plan three (3) days thereafter, the lower Court exercised

sound and proper discretion dismissing the case. Counsel's argument that the Plan could be modified for purpose of the Confirmation Hearing failed to provide cause to allow yet another Plan filing. Debtors' own counsel's statement that the Plan was not feasible without favorable rulings on ancillary issues fairly clearly established a factual basis for dismissal that this Court cannot hold to be clearly erroneous.

5. The Court further finds that stay relief is proper in the presence of no viable reorganization and no abuse of discretion occurred thereby.

IT IS NOW THEREFORE ORDERED that the Orders entered by the United States Bankruptcy Court dismissing the Debtor's case and granting stay relief, which Orders have been appealed herein, be and hereby are affirmed.

DATED this 30th day of May, 1991.

/s/ Ewing T. Kerr
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF WYOMING

In re	)	
	)	
KENNETH ROBERT AMES,	)	Case No. 90-05053-D
a/k/a Kenny Ames, and	)	Chapter 12
LILLIAN MAY AMES,	)	
	)	
Debtors.	)	

ORDER DENYING CHAPTER 12 PLAN CONFIRMATION
AND DISMISSING CASE

THIS MATTER having come before the court on October 30, 1990, for hearing on confirmation of the debtors' proposed Second Amended Chapter 12 Plan and the Motion to Dismiss filed by Sundance State Bank; Stephen R. Winship appearing for the debtors, Ken McCartney appearing for Sundance State Bank, and Sharon A. Dunivent appearing on behalf of herself as trustee; and the court having considered the pleadings, the statements and arguments of counsel, and being fully advised and in accordance with its findings and conclusions rendered orally at the close of the hearing, it is

ORDERED, the confirmation of the debtors' proposed Chapter 12 Plan be, and hereby is, denied; and, it is further

ORDERED, the Sundance State Bank's Motion to Dismiss be, and hereby is, granted and this case is dismissed.

DATED this 6 day of November, 1990.

BY THE COURT

/s/ Harold L. Mai
United States Bankruptcy Judge

Supreme Court, U.S.
FILED
JAN 14 1993
OFFICE OF THE CLERK

No. 92-942

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

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KENNETH ROBERT AMES and
LILLIAN MAY AMES,
Petitioners

v.

SUNDANCE STATE BANK,
Respondent.

---**---

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

---**---

BRIEF OF SUNDANCE STATE BANK IN OPPOSITION

---**---

Ken McCartney
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(307) 635-0555
Counsel of Record
Counsel for Respondent

January 8, 1993

QUESTIONS PRESENTED

1. Considering the seeming mandatory language of 11 U.S.C. §§502(c) and 553, must a Bankruptcy Court, in a case commenced under Chapter 12 of Title 11, estimate a Debtor's alleged setoff to a valid secured creditor's claim?

2. Considering 11 U.S.C. §§1225(a)(5)(B) and 1222(b)(7) and (8), must a Bankruptcy Court confirm a reorganization plan filed in a case commenced under Chapter 12 of Title 11 that provides for the transfer of a secured creditor's claim to different collateral over the creditor's objection as to reasonableness of the substitution?

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DECISION BELOW

In re Ames, 973 F.2d 849 (10th Cir. 1992) 2

STATEMENT OF THE CASE

Respondent, Sundance State Bank, hereafter referred to as The Bank, held the operating loan for the Petitioners' farming operations. The Bank had an undisputed secured interest in the Petitioners' livestock, equipment and machinery as collateral for the loan. The Debtors, Kenneth Robert Ames and Lillian May Ames, filed a petition for Chapter 12 bankruptcy relief on February 23, 1990. Dispute exists as to the status of the note when the Debtors chose to file for bankruptcy protection. This was done prior to normal annual communication regarding the Petitioners' financial situation with The Bank. The loan had backed up to the point renewal was unlikely, but the note was not called prior to the bankruptcy filing.

Petitioners filed their first Plan of Reorganization on February 26, 1990, but were immediately aware it required revisions after the creditors' meeting. An Amended Plan was filed on May 22, 1990, which contemplated, and

heavily relied upon for feasibility an as yet unfiled adversary proceeding against the Respondent for breach of loan commitment. The Court found that the Plan was not feasible because the proposed lawsuit was of insufficient real value for reorganization purposes as of that time.

A "Second Amended Plan of Reorganization" was filed on September 5, 1990. The Plan would have forced The Bank to accept being substituted a second interest lien on real estate for its original security of livestock, equipment and machinery. Respondent objected to the substitution because of the slowed real estate market in Wyoming at that time and argued that its claim had increased as a result of accruing interest and attorney's fees. The Bankruptcy Court once again denied confirmation for lack of feasibility, lifted the Automatic Stay and dismissed the case. *In re Ames*, 973 F.2d 849 (10th Cir. 1992) The Petitioners are appealing those decisions.

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SUMMARY OF ARGUMENT

Pursuant to 11 U.S.C. §502(c), a Bankruptcy Court shall estimate a secured creditor's claim against a Bankruptcy estate that is disputed by the Debtor. The Petitioners suggest it is an abuse of discretion and is a basis for reversal of the Court's decision for a Bankruptcy Court to refuse to estimate a contingent claim yet unfiled cause of action as a potential setoff of a secured creditor.

Although a substitution of collateral may be made in a Reorganization Plan, it is not an abuse of discretion for a Bankruptcy Court to determine that a substitution of certain collateral may make it impossible or very burdensome for the secured creditor to sell the collateral and obtain some compensation for his status as a secured creditor, and thus deny confirmation of a Plan of Reorganization for lack of feasibility.

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ARGUMENT

NO GROUNDS EXIST FOR GRANTING CERTIORARI

A. It is not an abuse of discretion for a Bankruptcy Court to refuse to estimate a contingent counterclaim against a secured creditor for purposes of setting off an allowed proof of claim.

There is no question that §502(c) of the United States Bankruptcy Code gives the Bankruptcy Court a duty to estimate contingent claims against the Debtor's estate in order to avoid unnecessary delay in case administration. However, Petitioners confuse this issue with the difference between a potential lawsuit in the nature of a setoff or counterclaim and a "claim" against the Debtor's estate. A Bankruptcy Court does not have a duty to value all potential, theoretical offsets which may never materialize. To suggest that it does would clothe a Debtor with a powerful tool to abuse any assertion.

Note the difference between estimating an unsecured claim in a setoff, none of the creditors which will receive a significant percentage distribution, and "estimating"

complex counterclaims in commercial litigation. It is not an abuse of a Bankruptcy Court's discretion to refuse to determine the value of a contemplated lawsuit. Because the Bankruptcy Judge found that the potential lawsuit in this case, which was not even filed in a court anywhere at the time, would probably not materialize within the time frame of the Chapter 12 proceeding and therefore not benefit the Debtors in any way during the proceeding, the Court exercised its discretion and refused to put a value on the lawsuit against The Bank, which the Petitioners had contemplated for purposes of setoff.

The Court's refusal to value the lawsuit caused the Plan to be unfeasible since it relied entirely on the contemplated wrongful liability suit against the Respondent, Sundance State Bank. After three tries at producing a confirmable Plan, the Court dismissed the case.

The decisions made by the Bankruptcy Court were totally within its discretion and should

not be reversed unless it is found that the Court was clearly erroneous in its findings. A de novo review of the case is appropriate in this situation. This Court should not substitute its interpretations of the application of the law for that of the Bankruptcy Court if any applicable law supports the Bankruptcy Court's actions. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-574 (1985).

B. It is not an abuse of discretion for a Bankruptcy Court to deny confirmation of a Chapter 12 Plan that provides for an unreasonable substitution of collateral.

It is true that substituting collateral for short periods of time is occasionally commercially reasonable and sometimes allowed in Bankruptcy proceedings. However, it is totally within the discretion of the Bankruptcy Court to determine that a substitution of collateral over a long period of time should not be allowed in a Chapter 12 Bankruptcy proceeding.

Counsel for The Bank objected to the use of its collateral until such time as The Bank's entire claim was paid. While, as the Petitioners suggest, land is a "reduced risk collateral not prone to disease, predators, bad weather," it is not as easily liquidated as would be a herd of cattle.

The Bankruptcy Court based its decision to disallow the substitution of a second interest in land for the original collateral of cattle and equipment on the fact that at the time of the decision, land in Wyoming was not easily liquidated. If the Court had allowed the substitution, it would have imposed an undue burden on or prejudice against the Respondent. Further, Sundance State Bank is not a long-term lender and had no plans to make a thirty year loan, especially one secured by a second mortgage.

The Debtors crossed over bounds of commercial reasonableness with this proposal. They proposed to pay a higher interest rate loan

with a lower interest rate creditor's collateral. The Debtors' effort here was to take an 11.5% creditor's currently due-in-full note, stretch it to a thirty (30) year payout, and pay down an eight percent (8%) creditor's loan thirty (30) year obligation with the 11.5% creditor's collateral. This plan does not make good business sense, nor is it the most profitable use of the cash collateral.

The Petitioners look to Chapter 13 Bankruptcy provisions and argue that other Courts have allowed substitution of collateral. They further argue that payouts of "any property" of value are appropriate. While the provisions of Chapter 13 Bankruptcy and the provisions of Chapter 12 bankruptcy are somewhat similar, Chapter 13 precedent holds very little weight here. U.S.C. §1222(a)(9) does not give authority for a Chapter 12 Plan to extend secured creditor payouts over a longer period of time than five years, although it may be reasonable for a brief period of time.

The Bankruptcy Court properly exercised its discretion in protecting a secured creditor's claim and right to receive payment for that claim based on the current market, the nature of the creditor's business and the burden such a substitution would place on the creditor when finding that the Petitioners' Chapter 12 Plan was not feasible.

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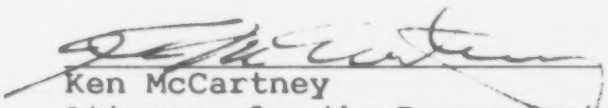
CONCLUSION

Petitioners fail to show that the Bankruptcy Court abused its discretion in refusing to estimate the value of the possible lawsuit against The Bank for purposes of setoff and for determining that the Plan of Reorganization presented to the Court was not feasible for substitution of collateral. Neither issue on the facts this case presents is compelling enough to merit this Court's involvement.

For the reasons stated above, Respondent,

Sundance State Bank, respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully Submitted,



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Date: January 8, 1992